

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

RP.No. 62 of 2007

(AGAINST THE JUDGMENT DATED 21ST NOVEMBER, 2006 IN CRP 807 OF
2006 ON THE FILE OF HON'BLE HIGH COURT OF KERALA)

REVIEW PETITIONERS- REVISION PETITIONERS:

-
1. ALEYAMMA ITTAN PILLAI,
W/O.LATE ITTAN PILLAI, POTTAYIL HOUSE,
KAVUMPADY ROAD, MUVATTUPUZHA.
 2. P.I.JOY, S/O.LATE ITTAN PILLAI,
POTTAYIL HOUSE, (ELAVUMGAL),
ONAKKOOR KARA, MUVATTUPUZHA THALUK.
 3. P.I.JEEVAN, S/O.LATE ITTAN PILLAI,
AGED ABOUT 52, POTTAYIL HOUSE,
KAVUMPADY ROAD, MUVATTUPUZHA.

BY ADV. SRI.S.EASWARAN

RESPONDENTS: RESPONDENTS:

-
1. ISSAC T.CHERIAN, S/O.CHERIAN,
AGED 56 YEARS, THEKKUMMEL HOUSE,
PAIPRAKARA, MUATTUPUZHA VILLAGE, REPRESENTED BY HIS POWER OF
ATTORNEY HOLDER ISSAC CHERIAN, S/O.ISSAC,
THEKKUMMEL HOUSE, PAIPRA KARA, MUVATTUPUZHA VILLAGE.
 2. ALEYAMMA CHERIAN, W/O.CHERIAN,
AGED 74 YEARS, THEKKUMMEL HOUSE,
PAIPRA KARA, MUVATTUPUZHA VILLAGE.
 3. ISSAC CHERIAN, S/O.ISSAC,
AGED 77 YEARS, THEKKUMMEL HOUSE,
PAIPRA KARA, MUVATTUPUZHA VILLAGE.

....2/-

....2.....

R.P.NO.62/2007

**4. M/S.MALABAR FRUIT PRODUCTS COMPANY,
MANJALLOOR KARA, REPRESENTED BY ITS
MANAGING PARTNER ABRAHAM THOMAS,
S/O.THMAS, ETTUPAYIL HOUSE, KAVUMPADY ROAD,
MUVATTUPUZHA.**

**BY ADV. SRI.SHAJI P.CHALY (CAVEATOR)
SRI.S.V.BALAKRISHNA IYER**

**THIS REVIEW PETITION HAVING BEEN FINALLY HEARD
ON 17/01/2007, THE COURT ON 25/01/2007 PASSED THE
FOLLOWING:**

M.SASIDHARAN NAMBIAR,J.

R.P.NO.62 OF 2007

IN

c.R.P.NO.807 OF 2006

&C.R.P.No.421/2006

DATED, THIS THE 25TH DAY OF JANUARY,2007

ORDER

Petitioners in C.R.P. 807/06 have filed R.P. 62/07 under Order XLVII Rule 1 of Code of Civil procedure to review the order dated 21.11.06 dismissing the civil revision petition 807/06. The revision petition was filed challenging the order of executing court dated 28.9.06 in E.P.58/05 on the file of Munsiff Court, Muvattupuzha. According to petitioners, subsequent to the order dated 21.11.06, this court as per order dated 29.11.06 reviewed the earlier order in C.R.P.421/06 and as a result the order dated 21.11.06 based on the earlier order in C.R.P.421/06 also warrants a review. According to petitioners when the earlier order dated 15-7-06 in C.R.P.421/06 was reviewed, the

order dated 21.11.06 in C.R.P.807/06 is also to be reviewed. C.R.P. 421/06 was filed by petitioners challenging the order passed by executing court dated 14.6.06, overruling the objections raised by judgment debtors/petitioners on the executability of the decree in O.S.399/69 in answer to Rule 22 of Order XXI notice served on them. As per order dated 15-7-06 in C.R.P. 421/06, this court while dismissing the revision petition directed the executing court, to consider all the objections raised by petitioners in the execution petition holding that there is no reason to interfere with the order dated 14.6.06. It was pursuant to that order, executing court considered all the objections raised including the one agitated in C.R.P.421/06 and passed the order dated 28.9.06, overruling all the objections raised by petitioners and directing petitioners to remove the obstructions caused within the specified time and allowed decree holders to remove the

obstructions caused through process of court, if petitioners failed to comply with the directions. Petitioners challenged the order passed by the executing court in C.R.P.807/2006, on all the contentions, including the grounds taken in C.R.P.421/06. After an elaborate consideration of facts and law, this court as per order dated 21.11.06 dismissed the C.R.P, upholding the order of the executing court dated 28.9.06. The said order is sought to be reviewed in R.P. 62/07.

2. Though C.R.P. 421/06 was disposed by order dated 11.7.06, petitioners filed R.P. 971/06 to review that order and as per order dated 29.11.06 the learned single Judge who disposed C.R.P. 421/06 earlier, reviewed that order and posted the C.R.P. for fresh hearing. The said C.R.P. was also posted and heard along with R.P.62/07.

3. The case of petitioners in R.P. 62/07 was that in view of the order dated 29.11.06 in C.R.P.421/06, the order in C.R.P. 807/06 is also reviewed. According to petitioners, the order in

C.R.P. 807/06 was based on the findings in the earlier order in C.R.P. 421/06, which was later reviewed, and therefore the questions answered in C.R.P.807/06 requires reconsideration. It was contended that fourth respondent did not obtain permission of the court as provided under Rule 16 of Order XXI, and no separate application was filed for permission as provided under Rule 16 and notice under Rule 22 served on petitioners is not a substitute for the notice provided under Rule 16 and as held by this Court in **Velayudhan v. Subadramma (1989 (2) KLJ 55)** without a notice under Rule 16 executing court has no jurisdiction to proceed with the execution petition filed by an assignee decree holder and therefore the order in C.R.P. 807/06 is to be reviewed. Petitioner also contended that this court erred in holding in C.R.P. 807/06, that both the decree holder and assignee decree holders have filed the execution petition and therefore Rule 16 notice is not

mandatory and that finding is erroneous and for that reason, the order warrants a review. It was also contended that the assignee decree holder did not obtain any right over the disputed pathway covered by the decree in O.S.399/69. It was contended that the decree was passed in 1972 and assignment deeds were executed after 15 years from the date of the decree and the original decree holder parted with possession of their rights in the property in 1987 and therefore they did not have any right over the pathway, when the decree was assigned in 2005 and therefore the finding in the order that execution petition was filed both by the decree holder and assignee decree holders is incorrect and therefore the order is to be reviewed. It was also contended that the finding in the order that the way provided under the decree was not altered and the decree did not thereby become unexecutable is not correct as the report shows that the way was not in existence and it was lost sight of by this court when C.R.P.807/06 was

disposed and therefore the order dated 21.11.06 is to be reviewed.

4. As stated earlier, all the contentions raised in C.R.P. No.421/06 were also raised in C.R.P. No.807/06. It was contended that the decree is unexecutable as there was non compliance with the provisions of Rule 16 of Order XXI and the decree for injunction is a personal decree which cannot be assigned and the assignees are not entitled to execute it and therefore the execution petition itself is not maintainable. It was also contended that the decree is barred by time.

5. Learned Senior counsel Sri.Venkatakrishnan appearing for petitioners and Senior counsel Sri.S.V.Balakrishna Iyer appearing for respondents were heard.

6. The arguments of Sri.Venkatakrishnan was that if the order dated 11.7.06 in C.R.P. 421/06 was not in existence, when C.R.P. 807/06 was heard and disposed, the decision in C.R.P. 807/06 would have been different and as the order in C.R.P.

421/06 was subsequently reviewed, order in C.R.P.807/06 also warrants fresh consideration, as this court was carried away by the earlier findings in C.R.P.421/06. It was argued that as held by this Court in **Velayudhan v. Subadramma (1989 (2) KLJ 55)** failure to give notice of the application filed by an assignee decree holder as provided under rule 16 goes to the very root of the case and the entire execution proceedings is therefore vitiated as it is void. Relying on the decision in **Sankarambal v. Lalitha Ganesan (1978 KLT 214)** it was argued that when Rule 16 contemplates an application by the assignee decree holder seeking permission to execute the decree and the Rule mandates that decree shall not be executed until the court has heard the objection of the original decree holder and the judgment debtor, after serving a notice on them of such application as provided under rule 16, a notice under Rule 22 is not sufficient and without a notice as provided

under Rule 16 and a specific permission granted, it is to be held that the execution proceedings is void and therefore the order of executing court is to be set aside. Learned Senior counsel relying on the decision of High Court of Karnataka in **Somnath Honnappa Bennalkar v. Bhimrao Subrao Patil (ILR 1974 Karnataka 1506)** argued that a decree for injunction is always a personal decree and is not a subject matter for assignment and such an assignee decree holder is not entitled to execute the decree and therefore it is to be held that the assignee decree holders are not entitled to execute the decree for injunction granted in favour of the original decree holder. Learned Senior counsel also argued that eventhough original decree holder had also joined as a petitioner in the execution petition, as he had parted with the rights over the properties in favour of the assignee decree holders in 1987, original decree holder has no subsisting right to file execution

petition by himself or with the assignees and as he did not have any right to be assigned under the decree in 2005, the assignee decree holders did not derive any right by the said assignment and by the assignment deeds of 1987 the assignee decree holders did not derive any right over the way on the subject matter of the decree and hence they are not entitled to execute the decree and it is to be held that the execution petition is not maintainable. Learned Senior counsel also argued that evidence clearly establish that the way provided under the decree was not being used for the last thirty three years from the date of the decree and the decree thereby became unexecutable and therefore R.P.62/07 is to be allowed and the order in C.R.P.807/06 is to be reviewed. The learned senior counsel argued that C.R.P. 421/06 is to be allowed as the execution petition is not maintainable in law or facts.

7. Sri.Balakrishna Iyer argued that in C.R.P.807/06 all the contentions raised in

C.R.P.421/06 was considered on merit and that too independent of the findings in the order in C.R.P. 421/06 dated 11.7.06 and therefore for the reason that the order in C.R.P.421/06 was subsequently reviewed, the order in C.R.P. 807/06 is not to be reviewed. Learned senior counsel pointed out that petition for review is not a substitute for an appeal and the remedy of the petitioners, if aggrieved by the decision in C.R.P.807/06, is to challenge the same before the superior court and not a petition for review and for that reason R.P.62/07 is to be dismissed. Learned Senior counsel also argued that the contentions raised by petitioners in R.P.62/07 were considered in detail in the order dated 21.11.06 and there is no apparent error or sufficient reason warranting a review of that order. It was further argued that this court did not agree with the decision of the High Court of Karnataka in **S.H. Bennalkar's case (supra)** and as per the order dated 21.11.06 it was

specifically found against petitioners and they are not entitled to reagitate the same question by filing a petition for review. Learned counsel also argued that this court found that execution petition was filed not only by the assignee decree holders but also the assignor decree holder also and therefore rule 16 notice is not mandatory and hence on that ground the order is not to be reviewed. It was also argued that under proviso to Article 136 of Limitation Act, there is no period of limitation for execution of a decree for permanent prohibitory injunction and therefore the execution petition was not barred by time and on the evidence this court found that the way has not been materially altered in such a way that it cannot be enjoyed or thereby the decree became unexecutable and therefore the review petition is only to be dismissed. It was also argued that as the challenge in C.R.P. 421/06 was already considered and answered against petitioners in C.R.P.807/06, C.R.P. 421/06 is also to be

dismissed.

8. Rule 1 of Order XLVII provides that any person considering himself aggrieved by a decree from which no appeal has been preferred, may apply for a review of the judgment or order, to the court which passed decree or order if the conditions provided under sub rule (1) are satisfied. A party on the discovery of new and important matter or evidence, which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was passed, is entitled to apply for review under Rule 1. So also a person considering himself aggrieved is entitled to file an application for review, either on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The scope of an application for review is not similar to that of an appeal. A review is by no means an appeal in disguise where by an erroneous decision is reheard and corrected. Even if it is an erroneous decision, the remedy is

not to file a petition to review but prefer an appeal. The foremost requirement for maintaining an application for review is that the order sought to be reviewed, suffers from an error apparent on the face of the record and permitting the order to stand will lead to a failure of justice. In the absence of any such error or other sufficient reason the finality attached to the judgment or order cannot be lightly disturbed. An error which is not self evident and has to be detected by the process of reasoning can hardly be said to be an error apparent on the face of the record justifying the exercise of the power of review. Even if it is an erroneous decision, unless the error is apparent on the face of the record it is not a ground for review. When an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, it is a case of an error apparent on the face of the record which warrants exercise of the power. Such an error is to be patent and shall be located without

elaborate arguments and that too without scope for any controversy with regard to such error. If the view taken in the judgment or order, is a possible or reasonable view, it is not an error apparent on the face of the record warranting exercise of the powers of review. When on a question of law, different views are possible including the one taken in the order it does not warrant exercise of the power of review. Any other sufficient reason provided in Rule 1 was held by Judicial Committee as must mean "a reason sufficient on grounds at least analogous to those specified in the rule" in **Chhajju Ram v. Neki (AIR 1922 P.C.112) which was reiterated in Bisheshwar Pratap Sahi v. Parath Nath (AIR 1934 P.C. 213)**. It was followed by the Apex Court in **M.M.B. Catholicos v. M.P. Athanasius (AIR 1954 SC 526) and in Lilly Thomas v. Union of India (AIR 2000 SC 1650)**. The question is whether the order dated 21.11.06 warrant exercise of power of review.

9. If the order dated 21.11.06 was based on the finding in the order in C.R.P. 421/06, which was subsequently reviewed, the argument of learned Senior counsel that the order in R.P. 971/06 reviewing the earlier order is a sufficient ground to review the order, could have been accepted. But that is not the case herein. Each of the objections, which were raised by petitioners in C.R.P.421/06, were independently considered in C.R.P.807/06. The objections were not answered on the basis of the order in C.R.P. 421/06. Therefore review of the order in C.R.P.421/06, by itself is not a sufficient ground to review the order in C.R.P.807/06.

10. The other grounds alleged by the petitioners for review are the following:-

(i) There was non-compliance of provisions of Rule 16 of Order XXI. The decision of this court in **Velayudhan's** case was not properly appreciated and a notice under Rule 22 is not a substitute for a notice under Rule 16. Though original decree

holder joined in the execution petition, he had no right to assign the decree for injunction or the assignee decree holders have no right under the assignment and the decree holder has no subsisting right and therefore their joining together in filing the execution petition is insufficient to dispense with the requirement of complying with the mandatory provisions of Rule 16.

(ii) The decree for injunction is a personal decree and is not a subject matter for assignment and the assignee decree holder is not entitled to execute the decree.

(iii) The decree holder assigned the properties in 1987 and therefore thereafter he has no right over the way, either to execute the decree or to assign the decree and the execution petition filed after 15 years from the date of assignment is not maintainable.

(iv) The fact that the way has been altered materially, making the decree unexecutable was not considered in the light of the evidence.

11. All these aspects were considered in detail as per order dated 21.11.06 which is sought to be reviewed. Even if the decision is erroneous, unless the error is apparent on the face of the record, it cannot be reviewed. Even if on the evidence or law, it is possible to take a different view, that is not a sufficient ground to exercise the power of review.

12. It was not disputed that, execution petition was filed not only by the assignee decree holders but the original decree holder. The execution petition was not filed by the assignee decree holder alone. If that be so, Rule 16 of Order XXI has no application. That rule applies only when the decree is sought to be executed by the transferee of the decree and not when the decree is sought to be executed by the decree holder along with the assignee decree holder. While considering the question whether an execution petition filed by the original decree holder and the assignee decree holder, jointly a notice as

provided under Rule 16 is necessary, the question of either the original decree holder to assign the decree or the right of the assignee decree holder under the assignment are not very relevant aspects.. Rule 16 contemplates a notice to the original decree holder and the judgment debtor, if the execution petition is filed by the assignee of a decree pursuant to the assignment of the decree. Therefore argument of senior counsel that decree holder who parted with the rights over the properties in 1987, has no right to execute the decree or has no right to assign the decree in favour of the assignees in 2005 or the assignee decree holders are not entitled to execute the decree are not relevant aspects to be looked into at that stage. The requirement of Rule 16 would arise only if the execution petition is filed by the transferee of a decree without the junction of the decree holder. Therefore the proceedings in the execution petition, cannot be termed void as canvassed by the learned senior counsel. Therefore

on that ground, the order cannot be reviewed. The decision of the Division Bench of this Court in **Sankarambal's case (supra)** relied on by learned senior counsel has no application to the facts of this case.

13.The argument of learned senior counsel relying on the decision of learned single Judge of High Court of Karnataka in **S.H. Bennalkar's case (supra)** was considered in the order sought to be reviewed. That decision was considered by a learned single Judge of this Court in **Chothy Theyyathan v. John Thomas (1997(1) KLT 464)** and did not agree with the principle settled therein. A Division Bench of this Court in **Rajappan v. Sankaran Sudhakaran (1997 (1) KLT 748)** again considered the same question and approved the principle settled in **Chothy Theyyathan's case**. In view of the Division Bench decision, which is binding on this court, the argument of learned senior counsel relying on **Bennalkar's case** cannot

be accepted. Therefore on that ground also the order cannot be reviewed.

14. Though learned counsel vehemently argued that the assignment in favour of the fourth respondent was only in 2005, 15 years after the assignment of the right of the decree holders over the property, and after the earlier assignment in 1987 and so the original decree holder has no subsisting right to be executed or to be assigned and therefore neither the original decree holder nor the assignee decree holders are entitled to execute the decree and on that ground the order is to be reviewed, all these contentions raised were considered in detail in C.R.P.807/06. Even if it is taken that the view expressed by learned senior counsel is a possible view, so long as the view taken by this court in C.R.P. 807/06 is a possible and reasonable view, on that ground also the order cannot be reviewed. In any event, it is not an apparent error. The remedy of the petitioners is to challenge the order, before the superior court

and not to file a petition for review.

15. The decree is for permanent prohibitory injunction. Though Article 136 of the Limitation Act provides for a period of 12 years for execution of any decree other than a decree granting a mandatory injunction or order of any civil court, the proviso makes it absolutely clear that an application for enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation. Therefore on that ground also the order cannot be reviewed.

16. Though the learned senior counsel vehemently argued that the finding in the order, sought to be reviewed, that the evidence do not substantiate the argument that the way has been materially altered is not correct and attention was drawn to Ext.B2 report, I cannot agree with that submission. Ext.B2 report does not establish that the way has been materially altered in such a way that it cannot be enjoyed as provided under the decree and thereby the decree became unexecutable.

Eventhough the decree was passed in 1972 and the assignment of the properties by the decree holder was in 1987, evidence do not establish that the nature of the way or the property has been materially altered so as to make it impossible to use the way or render the decree unexecutable. Hence it is also not a ground to review the order. I find neither any apparent error nor other sufficient reason to exercise the power of review as canvassed by petitioners. R.P. is dismissed as bereft of merit.

17. In C.R.P.421/06 the order of the executing court was challenged on the grounds that there was non-compliance of the provision of Rule 16 of order XXI and decree for injunction is a personal decree which is not a subject matter for assignment and the assignee decree holders did not derive any right under the assignment and therefore the decree is not executable. It was also contended that the decree is barred by time. All these contentions were again raised in C.R.P.807/06, challenging

the final order passed in E.P.58/06. These contentions were specifically considered and overruled in C.R.P 807/06. In such circumstances, there is no necessity to consider the question once again in C.R.P. 421/06. In view of proviso to Article 136 of Limitation Act, the decree is not barred by time as canvassed by the petitioners. The execution petition was not only filed by the assignee decree holder but also by the original decree holders and therefore non-compliance with Rule 16 of Order XXI of C.P.C is not fatal. In view of the Division Bench decision of this Court in **Rajappan's case** the contention that the decree for injunction is a personal decree is also not sustainable. Hence there is no merit in C.R.P. 421/06. C.R.P. 421/06 is also dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

Tpl/-